



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 4, 1991

Mr. Mark Tobey  
Acting Chief  
Antitrust Division  
Office of the Attorney General of Texas  
P. O. Box 12548  
Austin, Texas 78711-2548

OR91-538

Dear Mr. Tobey:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 11321.

The Antitrust Division of the Office of the Attorney General received a request for copies of all information pertaining to the lawsuit of the State of Texas against Visa USA, Inc. and MasterCard International, including information about the marketing of point-of-sale debit cards. The State of Texas, along with thirteen other states, filed suit against Visa and MasterCard in July of 1989. The lawsuit was settled on May 8, 1990, without trial or adjudication of any issue of fact or law. You say you are willing to release the filed pleadings and press clippings, but seek to withhold the remaining information about the case based on sections 3(a)(1), 3(a)(4), 3(a)(8), and 3(a)(10) of the Open Records Act. We have received briefs from both Visa and MasterCard.

We consider your claims under section 3(a)(1) of the Open Records Act, which excepts from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You raise the "co-counsel component" of the attorney-client privilege under section 3(a)(1). Recently, this office determined that although this office has frequently cited section 3(a)(1) to protect from required disclosure information within the attorney-client privilege, the privilege is more specifically covered by section 3(a)(7). Open Records Decision

No. 574 (1990). Any materials you have that reveal the opinions, advice, or recommendations that were made to associated attorneys may be withheld as within the attorney-client privilege of section 3(a)(7). *See id.* Of the documents you sent as representative samples of the requested information, we have determined that the privilege applies to the preliminary drafts of various legal documents. These drafts represent the advice, opinion, and recommendation of the drafter. *See* Open Records Decision No. 559 (1990) (preliminary drafts consist of the advice, opinion, and recommendation of drafter and as such are excepted from required disclosure by section 3(a)(11) of the Open Records Act). Furthermore, the privilege also applies to some information in the investigative notes and to the memoranda about the case from your division to the Attorney General of Texas and to the offices of other state attorneys general.

We consider your claim under section 3(a)(1) that the informer's privilege applies to the requested information. You have not indicated to which information the privilege applies. Of the materials you sent for our inspection, we assume you raise the privilege only in regard to the copy of the letter of September 25, 1987, of to the New York Attorney General's Office. The informer's privilege is in reality the government's privilege to withhold from disclosure the identity of those who supply information about violations of law to law enforcement agencies. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege can also be invoked by administrative officials with a duty of enforcing particular laws, including civil laws. Open Records Decision No. 391 (1983). The reason for the privilege is to protect informants from possible retaliation. Open Records Decision No. 579 (1990). The privilege is no longer applicable once the identity of the informant becomes known to those who would have cause to resent the communication. *Roviaro v. United States*, *supra*. Because this letter contains allegations of violations of antitrust laws and because the identity of the informant has not been disclosed, we have determined that information in the letter that tends to identify the informant may be excepted from required disclosure under the informer's privilege aspect of section 3(a)(1). We have marked the letter accordingly.

We focus now only on certain information about Visa and MasterCard that you obtained from the State of New York in the course of the multistate litigation. The State of New York had obtained the information from Visa and Mastercard through a subpoena issued pursuant to section 342 of New York General Business Law. Before the State of New York gave access to the information to the Antitrust Division of the Texas Office of the Attorney General, the antitrust divisions of both

states entered into a confidentiality agreement under which the subpoenaed materials would be used only for official purposes of the investigation and would not be disclosed to the press or to the competitors of MasterCard or Visa. Thus, in sharing with the antitrust division of this office information that would not be disclosed to the general public, New York gave this office a special status based on its common interest in the antitrust litigation. You, as well as counsel for Visa and MasterCard, raise several exceptions to the required disclosure of this information. We find the subpoenaed information is excepted from required public disclosure under section 3(a)(1) because it is made confidential by New York statutory law. Thus, we will discuss the relevant New York statute and need not consider your other claims in regard to this information.

New York General Business Law section 343 sets forth the procedures for an investigation by the attorney general of possible violations of New York antitrust laws. The provision states in pertinent part:

It shall be the duty of all public officers, their deputies, assistants, clerks, subordinates or employees, and all other persons to render and furnish to the attorney general, his deputy or other designated representative, when so requested, all information and assistance in their possession or within their power. *Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the attorney general the name of any witness examined or any other information obtained upon such inquiry, except as so directed by the attorney general shall be guilty of a misdemeanor.* (Emphasis added.)

This provision provides confidentiality to material obtained by the New York Attorney General through a subpoena. See *Amos Post, Inc. v. Attorney General of New York*, 416 N.Y.S.2d 885, 887 (N. Y. App. Div. 1979). We find that the transfer of the subpoenaed information from the Attorney General of New York to the Antitrust Division of the Attorney General of Texas does not destroy its confidential character. It is well established that the transfer of information between state agencies does not destroy the confidentiality of that information. Open Records Decision No. 561 (1990). Similarly, information deemed confidential by federal law that a federal agency shares with a state agency retains its confidential status. *Id.* Likewise, for reasons of interstate comity, we recognize the authority of the New

York Attorney General to control dissemination of the subpoenaed information. Section 3(a)(1) of the Open Records Act preserves the confidentiality of information deemed confidential by New York law when such information is shared with the Antitrust Division of the Texas Office of the Attorney General during intrastate litigation. Consequently, you may withhold the Visa and MasterCard materials that were obtained by a New York subpoena. We therefore need not consider the application of section 3(a)(10) to this material.

We also note that among the items from the case file which were sent for our inspection were documents in which the contents of the subpoenaed materials were listed in notation form. The form of information does not ordinarily affect its releasability. *See* Open Records Decision No. 401 (1983). You may, therefore, also withhold the notes which are derived from the contents of the subpoenaed information.

The final exception we consider in regard to this request is section 3(a)(11) which excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of this exception is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. *Open Records Decision No. 565 (1990)*. This protection is intended to encourage open and frank discussion in the deliberative process. *Open Records Decision No. 538 (1990)*. The exception does not apply to facts and written observation of facts. *Open Records Decision No. 450 (1986)*. We will consider the application of this exception to one category of information within the case file, the reports of non-testifying witnesses.

Section 3(a)(11) applies where the information in question is prepared by outside consultants, rather than employees of the agency. *See Open Records Decision Nos. 437 (1986); 335 (1982); 298 (1981); 293 (1981); 192 (1978)*. In determining whether the information submitted by an outside consultant deserves the protection of section 3(a)(11), we must decide if the information served a role in the deliberative process of the governmental body. *Open Records Decision No. 466 (1987)*. We find that if the information submitted by a non-testifying expert played an integral function in the litigation decisions made by the attorneys of the Antitrust Division of the Office of the Attorney General of Texas, it may properly be withheld under section 3(a)(11). In other words, if the expert's advice or opinion was taken into consideration by the attorneys on the case, then such advice and

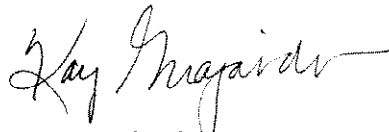
opinion played a role in the deliberative process of those attorneys and the exception applies. *See Hoover v. Department of the Interior*, 611 F. 2d 1132 (5th Cir. 1980)(material prepared by non-testifying expert held exempt from disclosure as "intra-agency memorandum" within Freedom of Information Act, 5 U.S. C. §552(b)(5).

This is so even when the case has been settled and the deliberative process has actually concluded. The above-mentioned purpose of the exception- to insure that decisionmakers receive unimpeded advice and opinion- would not be served by the release of an expert's report which was relied on during litigation by an agency's attorneys. We think that in such situations the disclosure at *any* time of information obtained from non-testifying experts would inhibit the free flow of their advice.

To summarize, of the documents listed in the letter of April 10, 1991, from Alyce Guynn Corsbie, you may withhold pursuant to the Open Records Act four categories of information: the documents that we have determined above to be within the attorney-client privilege of section 3(a)(7); the documents produced by Visa and MasterCard pursuant to New York subpoena, which are deemed confidential by New York statutory law and thus within section 3(a)(1); information in the letter addressed to the New York Attorney General's Office which you may withhold based on the informer's privilege aspect of section 3(a)(1); and the reports of experts which played a role in the decisions of the attorneys on the case and which are thus protected by section 3(a)(11). As we have determined that no other exception in the Open Records Act which you have raised applies to the other listed categories of information, you must release the remainder of the information.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR 91-538.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Kay Guajardo", with a stylized flourish at the end.

Kay Guajardo  
Assistant Attorney General  
Opinion Committee

Ref.: ID#'s 11321, 12969, 12926, 11515, 11460, 11324, 12162

KHG/lcd

cc: MasterCard International  
888 Seventh Avenue  
New York, NY 10106

VISA U.S.A., Inc.  
P. O. Box 8999  
San Francisco, California 94128